

Fred H. Perkins  
Joseph T. Moldovan  
Michael R. Dal Lago  
MORRISON COHEN LLP  
909 Third Avenue  
New York, New York 10022  
(212) 735-8600  
Attorneys for Customer Claimant David Silver

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

Adv. Pro. No. 08-01789 (BRL)

SIPA Liquidation

(Substantively Consolidated)

Hearing Date: February 2, 2010

Hearing Time: 10:00 AM

**STATEMENT OF DAVID SILVER  
IN RESPONSE TO TRUSTEE AND SIPC'S MOTION  
FOR AN ORDER UPHOLDING TRUSTEE'S DETERMINATION  
RELATING TO NET EQUITY CALCULATION**

Customer Claimant David Silver ("Silver"), through his attorneys Morrison Cohen LLP, respectfully submits this statement in response to the motion by the trustee ("Trustee") for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Corporation Act, 15 U.S.C. § 78aaa, *et seq.* ("SIPA"),

and by SIPC, which motion seeks to confirm the Trustee's calculation of "net equity" under the "cash in/cash out" approach.

### **ARGUMENT**

The Trustee and SIPC's pending motion seeks to have this Court affirm the Trustee's approach to determining net equity under SIPA via a "cash in/cash out" method, rather than by relying on the amounts set forth in customer's most recent BLMIS account statements. Silver has previously filed a timely customer claim seeking recovery in connection with his individual retirement account. To date, there has been no determination by the Trustee regarding Silver's customer claim.

Silver believes that the issue of whether an investor's direct account and an individual retirement account for that same investor's benefit should be treated as different accounts held by two separate customers for calculating net equity is *not* currently before this Court on the Trustee's motion. Nonetheless, to the extent such issue is deemed properly before the Court on the current motion, Silver requests that the Court confirm -- consistent with the Trustee's prior claim determination in this proceeding and applicable SIPA rules -- that personal accounts held directly by a customer and individual retirement accounts for the benefit of the same customer are treated separately (as being held by separate customers) for net equity calculation purposes and determination of entitlement to recovery on a customer claim.

Under SIPA, an investor may be entitled to a distribution from SIPC and the Trustee if the investor has "net equity" in his or her brokerage account. In determining net equity, "accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers." 15 U.S.C. § 78lll(11); *see also* 15 U.S.C. § 78fff-3(a)(2) (same under statute governing advances by SIPC). This approach of treating individual retirement accounts

as separate from direct accounts for net equity and customer claim purposes is in accordance with applicable SIPA rules. *Compare* 17 C.F.R. § 300.101 (stating that “all accounts held with a member by a person in his own name, and those which under these rules are deemed his individual accounts, shall be combined so as to constitute a single account of a separate customer”) *with* 17 C.F.R. § 300.104 (stating that trust account “shall be deemed held by a separate customer of the member, distinct from the trustee, the testator or his estate, the settler, or any beneficiary of the trust”).

Indeed, the Trustee has in this proceeding previously treated individual retirement accounts for the benefit of an investor and direct investment accounts held by the same investor as “accounts of separate customers” for net equity and customer claim distribution purposes. *See Peskin v. Picard*, No. 08-01789, 2009 Bankr. LEXIS 2605 at 10-11 (S.D.N.Y. Bankr. Sept. 10, 2009) (Trustee treated as separate customer claims a customer’s individual retirement account and same customer’s direct investment accounts with BLMIS and authorized SIPC advance of \$500,000 each for both the individual retirement account and for the direct investment account). Silver respectfully requests that this Court confirm that the Trustee shall continue to treat individual retirement accounts opened by and for the benefit of an investor and direct investment accounts held by the same investor as accounts of separate customers, and calculate net equity and entitlement to distribution on customer claims accordingly for Silver and all other similarly situated BLMIS customer claimants.

#### **WAIVER OF MEMORANDUM OF LAW**

Silver requests that the Court waive and dispense with the requirement set forth in Rule 9013-1(b) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York that any motion filed shall have an accompanying memorandum of law.

No novel issue of law is raised by this statement and the authorities relied upon are cited herein.

Accordingly, Silver submits that a waiver of the Rule 9013-1(b) requirement is appropriate in these circumstances.

Dated: New York, New York  
November 12, 2009

**MORRISON COHEN LLP**

By: /s/ Fred H. Perkins  
Fred H. Perkins  
Joseph T. Moldovan  
Michael R. Dal Lago  
909 Third Avenue  
New York, New York 10022  
(212) 735-8600

Attorneys for David Silver